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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE, Plaintiff
vs.
CORRECTIONS OFFICER LESTER, Defendant.

FILED
HARRISBURG, PA

JAN 7 2002

MARY E. O'ANDREA, CLERK
Per _____

CRP No. 1-01-C-120
(Judge Rambo)
(Magistrate Judge Smyser)

PLAINTIFF'S WRITTEN OBJECTIONS TO THE U.S. MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION OF DECEMBER 10, 2001

CAMES now, the Plaintiff & his Counsel in the above entitled Civil Action, John Richard Jae, as a layman unlettered in the field of law, & legal procedures within the United States, & now files his Plaintiff's Objections to the U.S. Magistrate Judge's Report and Recommendation of December 10, 2001, pursuant to Fed. R. Civ. P. 72(b) & M.D.L.R. 72-3 & who over deposes & states:

1. The Plaintiff, John Richard Jae, a State Prisoner proceeding pro se, commenced this 42 U.S.C. § 1983 Civil Rights Action by filing a complaint on January 10, 2001, alleging that the defendant, a Corrections Officer at the State Correctional Institution at Camp Hill RHU, used excessive force on him August 23, 2000. Plaintiff's Request for Leave to Proceed In forma Pauperis was granted on January 25, 2001.

2. On March 27, 2001, the Defendant, Corrections Officer Lester, by Attorney, filed his Motion to Revoke Plaintiff's In forma pauperis status to stay the proceedings, herein this case. Defendant Lester, by Counsel, filed his Brief in support of that motion on April 10, 2001.

3. On June 27, 2001, the Plaintiff filed a petition for writ of mandamus in support in this case.

4. Defendant Lester's Brief in Opposition to Plaintiff's Petition for Writ of Mandamus was filed herein on July 22, 2001.

15. On November 7, 2001, U.S. Magistrate Judge J. Andrew Smyser of this Court entered his order, denying Plaintiff's petition for Writ of Mandamus, granting Defendant Lester's motion to Revoke the Plaintiff In Personam Pauperis status and vacating the order of January 2, 2001, giving the plaintiff's request to proceed in Personam Pauperis and further ordering that on or before November 27, 2001, the plaintiff shall pay the entire filing fee and that if the plaintiff fails to pay the filing fee, it will be recommended that this action be dismissed.

6. On December 10, 2001, U.S. Magistrate Judge Smyser filed his Report And Recommendation that Plaintiff has not paid the filing fee as ordered and recommending that the case be dismissed and that the case file closed.

7. Plaintiff's written objections to the U.S. Magistrate Judge Report And Recommendation Of December 10, 2001, herein.

I. PLAINTIFF'S CONSTITUTIONAL CHALLENGE TO THE
PRISON LITIGATION REFORM ACT AND § 1915(b).

In his November 7, 2001, Order, herein this case, U.S. Magistrate Judge Smyser, based upon 28 U.S.C. § 1915(g), states & holds that:

Because the plaintiff has had at least three cases on appeal dismissed as frivolous, malitious or for failure to state a claim, see Doc. 2 at 3, he may not proceed in Personam Pauperis in this action unless he is under imminent danger of serious physical injury.

Plaintiff specifically objects to this holding of the U.S. Magistrate Judge, because such is based upon 28 U.S.C. § 1915(b) and 28 U.S.C. § 1915(g) unconstitutionally denies a prisoner Plaintiff his 1st, 5th & 14th Amendments, U.S. Constitutional Rights to access to the courts and to equal protection and due process of the law as well.

¹/ Due to the fact that this Plaintiff on December 11, 2001, was transferred to the North Health Unit, he did not actually receive the U.S. Magistrate Judge's Report until December 12, 2001, or approximately 10 days after the Plaintiff's filing of his Objections to the Magistrate Judge's Report.

a. Prisoners Have A Fundamental Right Of Access To The Courts To Challenge The Conditions Of Their Confinement.

Plaintiff avers & submits that, 28 U.S.C. § 1915(b) (commonly referred to as the 'three-strikes provision') unconstitutionally burdens the affected prisoners' fundamental right to have meaningful access to federal courts to challenge the conditions of their confinement. More specifically, the provision is much broader than necessary to achieve the intended reduction in frivolous prisoner litigation, and brings within its broad sweep meritless claims as well as frivolous claims. Thus, it could result in repeated violations of the affected prisoners' civil rights while they serve their sentences.

P. Evolution of Prisoners' Right of Access to the Courts

In *Smith v. Bennett*, 368 U.S. 708 (1961), the U.S. Supreme Court held that a state could not refuse to accept an indigent prisoner's petition for writ of habeas corpus in the state court because the prisoner could not pay the four dollar filing fee.³¹ *Smith*, 368 U.S. at 712. While the Smith Court agreed that a state need not provide habeas review, once a state provides such review, it can deny indigent prisoners access to such review merely because they are unable to afford the filing fee.³² (*Smith*, 368 U.S. at 712.)

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court expressly rejected the State's assertion that the right of access to the courts did not extend to civil rights actions. (*Id.* at 579) The Court noted that there was no clear distinction between civil rights claims and habeas petitions because

both actions serve to protect basic constitutional rights. The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the great writ. The record affirms by this Court that prisoners have certain constitutional rights which can be protected by Civil Rights actions. ³³ These rights should be diluted if inmates, often "totally or

functionally illiterate,¹¹ were unable to articulate their complaints to the courts.¹²

In the late 1970s, the court made clear in *Banks v. Smith*,¹³ U.S. 817 (1977), that the obligation of the states extended beyond a mere prohibition against establishing impediments to personal access to courts, but required that they shoulder affirmative obligations to assure all prisoners meaningful access to the courts. (*Id.* at 824-25)¹⁴ In consequence, the court observed that the states had to provide prisoners inmates with writing instruments, notary services, postage, transcripts, and required to forego collection of docket fees. (*Id.*) These affirmations were not limited to criminal appeals and habeas petitions, but also extended to civil rights claims as well. The court noted that it has emphasized, "habeas corpus and civil rights actions are of fundamental importance... in our constitutional scheme because they protect a most valued right."¹⁵

Since the early 1990s, the fundamental nature of the prisoner's right to access to the courts has been rendered beyond debate. The Supreme Court has conclusively stated that the federal courts must take cognizance of the valid constitutional claims of prison inmates,¹⁶ and that, as a result of the fact that "a prisoner's primary right is directed of the privilege to vote, then right to court action might be said to be his remaining most fundamental political right because preservative of all rights."¹⁷

4. As the Third Circuit recently observed in *Brennan v. Rengstorff*¹⁸ (*quoting* *California Motor Transp. Co. v. Trucking* *Refugees & Others*). *Id.* at 1452-53 (citing *California Motor Transp. Co. v. Trucking* *Refugees & Others*, *404 F.2d 503, 510 (1972)*; *Boil Johnson's Restaurants, Inc. v. NLRB*, *481 U.S. 731, 741 (1983)* (declaring that "right of access to the courts is an aspect of the First Amendment right to petition the government"). See also *Bendell v. Delo*, *972 F.2d 204, 219 n.9 (5th Cir. 1992)* (noting that the right of access may also stem from equal protection rights under the First Amendment and First Amendment right to petition).

5. *Id.* at 827 (quoting *Wolff*, *418 U.S. at 579*; *Jackson v. Avery*, *393 U.S. 483, 485 (1968)*); *Perez Martinez*, *416 U.S. 396, 419 (1974)* ("The constitutional guarantee of due process which requires that prisoners be afforded access to the courts in order to challenge conditions and to seek redress for violations of their constitutional rights.").

6. *McCarthy v. Madison*, *503 U.S. 140, 153 (1992)* (quoting *Turner v. Safley*, *482 U.S. 78, 84 (1987)*).

7. *Id.* (quoting *Kirkwood Hopkins*, *118 U.S. 356, 370 (1886)*); see also *Adams v. Carken*, *403 U.S. 630 (7th Cir. 1973)* (noting that "an inmate's right to unimpeded access to the courts is a

In Lewis v. Casey, 116 S. Ct. 2174 (1996), the Supreme Court reaffirmed unequivocally that the right of access includes not only the ability to pursue criminal appeals and post-conviction relief, but also extends to giving rights activists the vindicate basic constitutional rights.⁸¹

II. Is There A Fundamental Right To Form Purpose Status?

Granting Indigents free access to the court scales back to Magna

Following this tradition, Congress enacted the Federal Habeas Petition Statute in 1871.¹⁰ The purpose of this statute was to guarantee that no citizen would be denied opportunity to commence, prosecute or defend a civil or criminal action in the courts of the United States merely because their poverty makes them unable to pay the filing fee to secure the costs.¹¹ The Supreme Court has not yet directly addressed the issue of whether a fee that must be provided to indigent prisoners so they are able to challenge the conditions of their confinement or to vindicate their constitutional rights - includes an inferior fee in federal civil rights actions. However, there is no doubt that the federal government must prepay filing fees for habeas petitions by indigent prisoners.¹² Given the equal importance of civil rights cases and habeas petitions in the constitutional scheme, it therefore seems logical to assume that meaningful access to the courts to pursue civil rights claims also would require that government waive filing fees for indigent prisoners. Analysis of the case law bear out this conclusion.

An examination of the cases in which the Supreme Court has considered whether the Fifth Amendment provides for indigent litigants supports a conclusion that such fees generally must be borne by federal courts, at least for civil rights cases filed by prisoners challenging the conditions of confinement. The language of these decisions strongly suggests that poverty status is a necessary fact that government must provide when the indigent prisoner seeks access to the courts. In order to insure a fundamental right, starting with the criminal appeal, that bears corpus cases, the court has concluded that the Constitution requires states to waive filing fees for indigent prisoners in order to insure that no one is denied justice as long as he may hold.

7-Cont'd. Right as my heart was set, I said, "I am ready." (See page 418 U.S. 47599.)

8/12. 9/2/18) - See (City Water, 4/18 U.S. v. S. 9-11, "Mg. Nicarta. (J.C. 9/18 No man will we get to no more with wednesday night on Justice." In the end, the court ruled that the proposed Intergovernmental Agreement was unconstitutional.

Holtzendorff (1995); Lee Wayne A. Kalkwarf, Roberta Stoeckel-Holma, David S. Lusk, and Michael J. Wettke vs. Williams, 24 CREIGHTON L. Rev. 803, 803-06 (1991) (recommending that the state legislature consider amending the statute to provide that the state may sue for damages for environmental contamination).

McDonald and Kettler's will and the other documents you may
need for your papers from Time or Magna Carta.

~~Indiana Public Law No. 1802, ch. 809, §1, 27 Stats. 252.~~

~~10 ACTIVITIES~~

ANALOGUE OF

WADDEGEEST, DUBONT de NEMOURS & CO., SES U.S. 331512 (NY). Onderhoudsbeleidingsgal (meten en regelen)

~~AD KINGS VILLE DU POINT DE NOMBERS & CO., 335 U. S. 333, 33 A.D. (1918). Copy of original document.~~

Firms' passports status as "to assure equality of consideration for all firms". See [Corporate United States](#), [EU \(EUROPEAN UNION\)](#) ([General](#)), [EU](#), [EU](#) ([EU](#))

ensure equal access to review of their criminal appeals and habeas petitions. Waiver of fees is a tool necessary for those litigants to vindicate their most basic fundamental rights.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the US Supreme Court held due process prohibited a state from denying access to the courts to a divorcing couple unable to pay the filing fee because the state has a monopoly on the only legal means to adjust the fundamental private relationship of marriage. *Id.* at 380-83.

All citizens must have access to the process that the state establishes for dissolving a marriage.¹³ Given the interest of states in the litigant, the court found no merit to Connecticut's argument justifying the filing fee as a measure to reduce frivolous litigation or as a mechanism of resource allocation and recuperation of costs.¹⁴

Because a fundamental right was at stake, the state could not close the courthouse to indigents seeking to vindicate that right.

In Little v. Streater, 453 U.S. (1981), the Supreme Court held that due process required that states provide free blood tests when needed by an indigent in certain paternity proceedings. Without access to the blood test, the court observed the alleged father "lacks 'a meaningful opportunity to be heard.'"¹⁵ Because the determination of familial relationships implicated a fundamental right, the state's financial interest in having the proceedings resolved at a lesser expense to the public was "hardly significant enough to overcome" that fundamental right.¹⁶

The Court also noted that the paternity action more closely resembled the proceedings in Boddie than those in Kras¹⁷ or Ortwein¹⁸ due to the constitutionally significant interests and the lack of an alternative forum.¹⁹

Prisoners facing significant deprivations of their fundamental constitutional rights, such as right to be free from racial discrimination,²⁰ to marry,²¹ to challenge

¹³ The Boddie Court reasoned that "a cost requirement, based on its face, may offend due process because it tends to foreclose a particular party's opportunity to be heard." *Id.* at 380.

¹⁴ The Boddie Court also reasoned that "other alternatives exist to fees and cost requirements as a means of conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits and actions summarily disposed of without a hearing, or only a hearing." *Id.* at 381-82.

¹⁵ *Id.* at 16 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 n.12 (1971)).

¹⁶ Any reference here to Kras, is to = [REDACTED] United States Kras, 409 U.S. 454 (1973).

¹⁷ Any reference to Ortwein, is to = Ortwein v. Schub, 410 U.S. 656 (1973).

¹⁸ *Id.* at 160-12. The indigent father in Little was a state prisoner at the time of the proceedings. *Id.* at 3.

¹⁹ Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam).

²⁰ See Turner v. Sarley, 482 U.S. 78, 97-99 (1987).

their convictions²¹, to practice their religion,²² to communicate with their families,²³ to be free from cruel and unusual punishment,²⁴ are more like the Plaintiff parties in Boddie, Streeter and Mays than those in Kenosha or Gutierrez. Although prisoners are no doubt less sympathetic, and while some rights may appear more sacred than prisoners' constitutional rights, unlike in Kenosha and Gutierrez, the rights at issue in actions challenging the conditions of a prisoner's confinement are clearly fundamental.²⁵

Moreover, given that prisoners' other rights are diminished significantly, that the government is intimately involved in virtually every aspect of the prisoner's life, and that because of incarceration prisoners virtually have no ability to avoid the alleged constitutional deprivations, right of access for prisoners may be even more fundamental than rights for free citizens²⁶ as the Supreme Court held in Lewis, prisoners must be given the tools necessary to challenge the conditions of their confinement; the filing fee, or the waiver, is the tool necessary for indigent prisoners to pursue such a challenge. To provide prisoners with a law library, pens, pads, postage, and even access to qualified legal assistance and then deny them the ability to actually file a complaint renders the other tools otherwise useless.

While many federal courts have observed that pauper status is not a tool that may be denied as a privilege for which there is no guarantee, this view is generally believed by Boddie, Streeter and Mays, which, when read in the context of Lewis and the other prisoner access to court cases, suggests that pauper's status is a tool that must be guaranteed to indigent prisoners when a finding is at issue.²⁷

This conclusion is also supported by the decisions dealing with abusive indigents who have filed numerous vexatious, harassing and frivolous complaints.

In many cases federal courts attempting to control vexatious litigants and abusive litigants, injunctions restricting further in forma pauperis filings by the abusive litigants. Section 1915(g) analogize it to this practice of entering injunctions against abusive litigants.

Suggesting that section 1915(g) did little more than codify an already existing rule, unlike the broad sweep of section 1915(b), cannot traditionally proceed very carefully. The punitive relief must be fitful of the nature of the right that they were restrain-

²¹ Smith v. Bennett, 365 U.S. 708 (1965).

²² D'Lane v. Estate of Gabace, 482 U.S. 342, 218 (1987).

²³ Phon-Burg v. Abbott, 490 U.S. 401, 401-412 (1989).

²⁴ Whitley v. Albens, 475 U.S. 312, 319 (1986).

²⁵ Any reference here to "L.B." refers to "L.B.-S.L.J." 117 S.Ct. 555 (1996).

²⁶ See In re Grier, 669 F.2d 229, 785 F.2d 18 (D.C. Cir. 1983) (holding that, conversely, where

at stake, access could not be barred by financial barriers and, conversely, where

fundamental right at stake, the court has upheld financial barriers). Cf. U.S. v. United States,

409 U.S. 434 (1973).

restricting with such injunctions, by first ensuring that the defendant is truly flagrant abuser and then entering narrow injunctions directed at the specific abuse. With the PLRA, however, Congress has taken a much broader approach that leaves no room for such individual discretion. The decisions of these courts that have granted injunctions generally demonstrate that, notwithstanding the belief that pauper status is a privilege, the courts recognize that infringement on the ability of in forma paupers places a substantial burden on the ability to exercise the fundamental right of access to the courts. See also Fickett v. City of Richmond, 1993 U.S. Lexis 22437, at 3 (4th Cir. Sept. 3, 1993) (finding that requirement that defendant pay 5% of filing fees is ban against ever proceeding in forma paupers in "potentially meritorious lawsuit," which effectively denies defendant's access to court); V. Alabama Pub. Serv. Comm'n, 936 F.2d 512, 517 (11th Cir. 1991) ("In recent years, courts have attempted to balance the various concerns and have determined that if the right of access means anything, it means that courts cannot construct blanket orders that completely close the courthouse doors to those who are extremely litigants." In re NYLOR, 839 F.2d 1290, 1294 (8th Cir. 1988) (concluding that "if he were to be precluded from proceeding in forma paupers in any case, his access to this court would be totally denied . . ."). We reject this alternative as to strict a sanction to impose . . .).

- b. Section 1915(g) Violates Due Process and Denies Equal Protection of the Law Under the Fifth and Fourteenth Amendments of the United States Constitution And Plaintiff's Rights Thereunder.

Section 1915(g) forecloses access to the federal court for the target class of indigent prisoner litigants except in very limited circumstances. This aside from the most extra ordinary circumstances, section 1915(g) radically reduces the role of federal courts in protecting the constitutional rights of prisoners, prohibiting in forma paupers status for those prisoners who have had three prior dismissals for frivolousness or for failure to state a claim. THIS IS UNCONSTITUTIONAL.

Congress now has effectively closed the doors to the federal courts in all manner of constitutional claims for indigent prisoners with three strikes against them. Section 1915(g) is not a facially neutral statute that has a disparate impact on indigents, but rather is specifically targeted indigent prisoners as opposed to all indigents, for different treatment and unequal protection. Given the fact that he simply may not be required to pay a filing fee (""), the courts cannot construct blanket orders that completely close the courthouse doors to those who are extremely litigants.

by the federal courts.²⁸ Because a prisoner's right of access to the courts is a fundamental right, and notwithstanding the fact that neither prisoners nor indigents are a protected class, wholesale foreclosure of a class of citizens from access to federal courts is scrutinized under both the Equal Protection component and the Due Process Clause of the Fifth Amendment. Generally, if a statute burdens a fundamental constitutional right, then strict scrutiny is applied. This requires that the statute be narrowly tailored to serve a compelling interest.

Because Section 1915(g) burdens indigent prisoners' fundamental Federal Constitutional rights to have "adequate," "effective" and "meaningful" access to the courts, such requires application of strict scrutiny as to such.

In Reno v. Flores, 507 U.S. 292, 301-02 (1991), the Supreme Court held that the Fifth and Fourteenth Amendments' guarantee of "due process of law" -- which forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest -- includes a substantive component, which forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

As the Supreme Court noted in M.L.B. v. S. L.V., that the access Court decisions decisions reflected both equal protection concerns by fencing off "potential litigants" and due process concerns related to the fair state-ordered proceedings anterior to adverse state action. 11 117 S. 566 (1996). . . . In either case, to the extent that § 1915(g) burdens a fundamental right, the analysis essentially will be the same in either component of the FRPL Amendment. As the Court noted in McFarl, 417 U.S. 600 (1974), [REDACTED] "Due process emphasizes between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated." 11 4 (1974). 11 Equal protection, on the other hand, emphasizes

treatment by a state between classes of individuals whose situations are arguably indistinguishable." Id. Discussing the claim that due process requires that indigent prisoners be appointed counsel at disciplinary appeals, the Ross court noted that "[o]f fairness sake, only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." Id. at 48.

Plaintiff avers & submits that herein this instant case, Plaintiff is dismissed because of his inability to pay the entire \$150.00 filing fee upfront all at once he will be denied meaningful access to this federal court because of his poverty and that § 1915(g) singles this Plaintiff, an indigent prisoner out and that § 1915(g) is not narrowly tailored to serve a compelling interest.

Given the above foregoing, it should be clear that section 1915(g) is unconstitutional and that Congress abused its authority enacting such statutory reclusion provisions that essentially tell affected indigent prisoners to go to the state courts that they courts are no longer open to them, and that they alone will receive protection of the law. By withholding the most essential tool for challenging the prisoners' conditions of confinement, Congress unconstitutionally burdened the affected class of prisoners' right to meaningful access to the federal courts. After decades of liberal reforms broadening prisoners' rights, the pendulum of the reform movement has swung to favor the opposite direction. Three strikes provision should be struck down or modified to conform with the Constitution.

The U.S. Magistrate Judge thus parked this Plaintiff's pro-poor status in this case based upon an unconstitutional federal statute and such order must, by law, be vacated by the District Judge & Plaintiff's pro-poor status must be restored herem this case which must not be dismissed.

~~28 cont'd~~ selected or reaffirmed a particular course of action at least in part because merely in spite of the adverse effects upon an identifiable group. 11 (internal quotation and citations omitted). See also Roper v. Evans, 169 U.S. 162, 20, 102 S.Ct. 1916 (hol-

II THE U.S. MAGISTRATE JUDGE ERRED IN [REDACTED]
APPLYING ABDUL-AKBAR V. MCKELVIE, 239 F.S.D.
307 (3d Cir. 2001) TO THIS CASE.

In his November 7, 2001, Order, in this case sub judice, the U.S. Magistrate Judge, stated & held -

The court must assess whether the prisoner was under imminent danger at the time the complaint was filed. Abdul-Akbar v. McKelvie, 239 F.S.D. 307, 312 (3d Cir. 2001).²⁹

* * * * *

The U.S. Magistrate Judge also stated & held, therein, that:

The plaintiff's claim that he was in imminent danger of serious physical injury at the time he filed his complaint because he could be acquitted again and because he has a heart condition is not consistent with known facts. By the time he filed his complaint the plaintiff was housed at a different institution from the institution where the defendant allegedly assaulted him. Accordingly, pursuant to § 1915(g) the plaintiff may not proceed in forma pauperis in this court in this case.³⁰

This Plaintiff specifically objects to the above statements of the U.S. Magistrate Judge in this case; he avers & submits such holdings/statements are clearly erroneous & contrary to law based upon the following facts & arguments.

On January 10, 2001, this Plaintiff commenced this complaint by filing his complaint. On January 15, 2001, this court granted this Plaintiff's request to proceed in forma pauperis in this case.

At the time this Plaintiff filed his complaint and at the time this court granted him leave to proceed in forma pauperis herein this case, V. Roman, 116 F.S.D. 83 (3d Cir. 1997) was the controlling authority in this case. On the U.S. Magistrate Judge's Order of November 7, 2001, at ¶

and in Gibbs v. Roman, 116 F.3d 83 (3d Cir. 1997), the U.S. Court of Appeals for the Third Circuit, stated held, that the court must assess whether the prisoner was under imminent danger at the time of the incident complained about.

However, in Abdul-Akbar v. McElveen, 239 F.3d 1022 (10th Cir. 2001), the Tenth Circuit held that the court must assess whether the prisoner was under imminent danger at the time the complaint was filed, overruling its prior decision in Gibbs v. Roman, as set forth above.

However, because Abdul-Akbar v. McElveen, was not only decided the Third Circuit after Plaintiff had filed his complaint herein case, but also several days after this court had granted the Plaintiff's request for leave to proceed in forma pauperis in this case and the Third Circuit did not hold that the new standard determining imminent danger in Abdul-Akbar was to be applied to cases which had been filed before such decision/change in imminent danger standard, Gibbs v. Roman was the controlling standard to be applied in this instant case, the U.S. Magistrate Judge was required to determine whether this Plaintiff was under imminent danger of serious physical injury at the time of the incident and under Gibbs v. Roman, not under Abdul-Akbar v. McElveen.

Because the U.S. Magistrate Judge used the wrong standard herein to determine whether or not this Plaintiff was under imminent danger of serious physical injury, his order of November 7, 2001, should be vacated and the District Court Judge should not adopt his Report and Recommendation of December 10, 2001, in this case, and should remand this case to the U.S. Magistrate Judge to determine whether or not this Plaintiff was under imminent danger of serious physical injury at the time the incident alleged in the complaint under Gibbs v. Roman.
RESPECTFULLY SUBMITTED
John Richard
John Richard
P.C. M.D.
MR. JOHN RICHARD
P.C. M.D.

Dae vs. Lester
CIVIL No. 1:01-CV-0041

CERTIFICATE OF SERVICE

I certify that on the 28th of December, 2001, I served attorney, connect copy of the within Plaintiff's written Objections to the U.S. Magistrate Judge's Report And Recommendation of December 10, 2001, the person listed below, by way of U.S. 1st Class Mail, postage prepaid and addressed to:

Mr. Michael McGovern,
Assistant Counsel
Office of the Chief Counsel or
The Pennsylvania Department of Corrections
55 Valley Drive
Camp Hill, PA 17011

I also certify that on the 28th of December, 2001, I gave to the officials here for mailing to this court, the original of the above-same document.

I certify under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the above is true and correct.

(S) John Richard Dae
MR. JOHN RICHARD DAE,
#BQ-3219
P.O. Box 99901
Pittsburgh, PA 15233-01

Dated/Executed On:

28th December 2001 =

At: Pittsburgh, Pennsylvania =

Plaintiff and Rose Casse